

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

ITV DIRECT, INC.

Plaintiffs,

v.

HEALTHY SOLUTIONS, LLC, et al,

Defendants.

---

AND RELATED CASES

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) Civil Action No. 04-CV-10421-JLT  
)  
) Honorable Joseph L. Tauro  
)  
) DEFENDANT HEALTHY SOLUTIONS,  
) LLC 's MEMORANDUM OF POINTS AND  
) AUTHORITIES IN OPPOSITION TO  
) CAPPSEALS MOTION FOR SUMMARY  
) JUDGMENT  
)  
)  
)  
)

It has long been black letter law that where two merchants establish contract terms through actions, conduct and course of dealing, those terms govern the contract between the parties. M.G.L. c.106, § 1-205; The Tupman Thurlow Co., Inc. v. Woolf International Corp., 3 Mass. L. Rep. 252, 1994 Mass. Super. Lexis \*13-14 (1994); Restatement of the Law, Second, Contracts §220. Significantly, Cappseals makes the conclusion that payment is due from Healthy Solutions, LLC; however, payment is not due and therefore, partial summary judgment should not be granted.

Where the parties have defined a contract term through extensive course of dealing, in this case when payment is due, that agreement is binding. M.G.L. c.106, § 1-205; The Tupman Thurlow Co., Inc. v. Woolf International Corp., 3 Mass. L. Rep. 252, 1994 Mass. Super. Lexis \*13-14 (1994). The purchase orders in this matter contain no express payment terms. (Aff. Of Harry N. Anderson, III in Support of Cappseals Inc.'s Motion for Partial Summary Judgment, Exhs. A-B). Movant Cappseals specifically, repeatedly and explicitly agreed with Healthy Solutions, LLC that payment for Supreme Greens nutritional supplement delivered to plaintiff ITV Direct would be made when Healthy Solutions, LLC received payment from ITV Direct. (Decl. Geremesz in Opposition to Cappseals Motion for Partial Summary Judgment, ¶¶3-5).

Cappseals reaffirmed this understanding and course of dealing even after Cappseals filed a Complaint against ITV Direct in Cappseals Inc. v. ITV Direct Inc., Sup. Ct. No. C 4 0482 in the Superior Court for the Commonwealth of Massachusetts in March 2004. (Decl. Geremesz, ¶5).

The parties' course of dealing over more than 30 transactions spanning six months was that Healthy Solutions, LLC paid Cappseals when it had been paid. (Decl. Geremesz ¶4). ITV Direct has not paid Healthy Solutions, LLC. Id. Healthy Solutions, LLC has not breached its agreement with Cappseals and partial summary judgment should not be

granted; *The Tupman Thurlow Co., Inc. v. Woolf International Corp.*, 3 Mass. L. Rep. 252, 1994 Mass. Super. Lexis \*13-14 (1994);

Similarly, Cappseals cannot unilaterally alter the terms of its agreement by internally creating a statement of account. In this case, Exh. D, "Trial Balance Report" was not provided to Healthy Solutions, LLC. Likewise the "Statement" was abrogated soon after it was sent to Healthy Solutions, LLC by Cappseals' continued agreement that it would accept payment when Healthy Solutions, LLC received money, if any, from ITV Direct. (Decl. Geremesz, ¶4). Partial summary judgment should therefore not be granted.

Dated: July 7, 2004

Respectfully submitted,  
HEALTHY SOLUTIONS, LLC,  
HEALTH SOLUTIONS, INC.,  
ALEJANDRO GUERRERO,  
MICHAEL HOWELL,  
GREG GEREMESZ  
By its and their attorneys,

/s/ Becky V. Christensen  
Becky V. Christensen, Esq. CA State Bar # 147013  
Craig McLaughlin, Esq. CA State Bar #182876  
LEVIN & O'CONNOR  
384 Forest Avenue, Suite 13  
Laguna Beach, CA 92651  
(949) 497-7676  
(949)497-7679 fax

Dustin F. Hecker  
POSTERNAK BLANKSTEIN & LUND LLP  
Prudential Tower  
800 Boylston Street  
Boston, Massachusetts 02199-8004  
(617) 973-6100

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2004, a copy of foregoing DEFENDANT HEALTHY SOLUTIONS LLC 's MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CAPPSEALS MOTION FOR SUMMARY JUDGMENT was filed electronically. Notice of this filing will be sent to call parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Katherine E. Perrelli  
Peter S. Brooks  
SEYFARTH SHAW LLP  
Two Seaport Lane, Suite 300  
Boston, MA 02210  
(617) 946-4800  
(617) 946-4801 Fax  
[pbrooks@seyfarth.com](mailto:pbrooks@seyfarth.com)  
[kperrelli@seyfarth.com](mailto:kperrelli@seyfarth.com)

Daniel J. Kelly  
GADSBY HANNAH LLP  
225 Franklin Street  
Boston, MA 02110  
617 345-7000  
617 345-7050 Fax  
[dkelly@ghlaw.com](mailto:dkelly@ghlaw.com)  
[cpriolo@ghlaw.com](mailto:cpriolo@ghlaw.com)

Attorneys for Plaintiff-in-Intervention  
CAPPSEALS, INC.

Christian H. Pedersen  
William D. Norman  
METAXAS, NORMAN & PIDGEON,  
LLP  
900 Cummings Center, Suite 207T  
Beverly, MA 01915  
(978) 927-8000  
(978) 922-6464 Fax  
[cpedersen@mnplaw.com](mailto:cpedersen@mnplaw.com)

Attorneys for ITV Direct, Inc. and  
Intervenor-Defendant  
DIRECT FULFILLMENT, LLC

/s/ Becky V. Christensen  
Becky V. Christensen  
Craig McLaughlin  
LEVIN & O'CONNOR  
384 Forest Avenue  
Suite 13  
Laguna Beach, CA 92660  
949 497-7676  
949 497-7679 Fax  
email: [bvc@levin-oconnor.com](mailto:bvc@levin-oconnor.com)